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(2)

No. 95-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID HELLER,

Petitioner,

v.

SYLVIA SMITH BOWMAN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court
of the Commonwealth of Massachusetts

MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY FOR LEAVE TO FILE A BRIEF AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Association for Union Democracy ("Association"), moves the Court to grant it leave to file the attached brief in support of the petition for a writ of certiorari, with petitioner's consent but without respondent's consent, for the following reasons:

1. Petitioner, a union member, asks the Court to grant certiorari to review a judgment upholding his liability for tortiously inflicting emotional distress on a fellow union member by publishing two pornographic photo collages during the time that she was running for president of their union. The petition asks the Court to consider whether the First Amendment requires the courts below to accord

petitioner greater protection of his right to criticize a candidate than they gave him.

2. The Association is a non-profit corporation, founded in 1969 and based in Brooklyn, New York, that seeks to further democratic principles and practices in labor organizations, both by encouraging members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within unions. No other organization devotes itself primarily to this objective.

3. In order to accomplish this objective, the Association publishes books, manuals and a newsletter; holds conferences attended by workers, lawyers and scholars; gives advice to members experiencing union democracy problems about how to organize within their unions to achieve more accountability and to eliminate corruption; and refers members whose union democracy problems may require litigation to lawyers who may be able to represent them. In addition, the Association has participated as *amicus curiae* in numerous cases in this Court. *E.g.*, *Wooddell v. IBEW Local 71*, 502 U.S. 93 (1991); *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989); *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989); *Finnegan v. Leu*, 456 U.S. 431 (1982).

4. In the past, the Association has provided legal and other support to numerous workers who have been threatened with retaliation for their exercise of their free speech right to criticize the leaders of their unions. The Association has watched with concern as a rising tide of libel suits threatens to suppress the sort of intra-union free speech that Congress sought to protect by passing the Landrum-Griffin Act. The

treatment of union officers, and candidates for union office, as limited public figures under the First Amendment may play an important role in permitting persons outside the union, such as general-circulation newspapers and magazines, to report on intra-union controversies. Within a union, however, it is unnecessary to rely on the First Amendment, because the principles of federal labor law provide at least as much protection to intra-union critics as the First Amendment might.

5. The Association has filed as *amicus curiae* in the past to urge the development of rules of state and federal law that would better protect union members against the crippling effect of libel litigation. *Trustees of the Southern California IBEW-NECA Trust Fund v. Jones*, 4th Civ. N. G 00 8384 (Cal. App.). Because of the Association's extensive experience with union democracy problems, it seeks leave to file the accompanying brief to explain how this case can be resolved under the principles of federal labor law, without reaching the First Amendment issues that are raised in the petition.

6. The written consent of petitioner's counsel to the filing of this brief is lodged with the Clerk. Respondent's counsel, Martha Davis, Esquire, refuses to grant consent.

CONCLUSION

The motion for leave to file a brief as *amicus curiae* in support of the petition should be granted.

Respectfully submitted,

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for Union Democracy as *Amicus Curiae*

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QUESTION PRESENTED

If a union member publishes a written criticism of another union member who is running for union office, is a tort suit based on that writing governed by the federal labor law principles of *Linn v. Plant Guards*, 383 U.S. 53 (1966), and *Letter Carriers Local 496 v. Austin*, 418 U.S. 264 (1974), thus making it unnecessary to decide whether the First Amendment requires a finding of actual malice?

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BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Association for Union Democracy ("Association") urges the Court to grant certiorari because this case presents important questions of federal law regarding the extent to which candidates in union elections may shift the forum where their qualifications for office will be decided, from the members who are eligible to vote on their candidacies, to the courts. However, the Association believes that the constitutional questions presented by the petition need not be decided here, because the judgment below conflicts with the rights of union members under federal labor law to express their views about candidates for office. Moreover, longstanding precedent in this Court requires plaintiffs

by expression concerning labor disputes to meet evidentiary standards that are at least as great as, and in some respects higher than, the standards that are imposed by the First Amendment. Accordingly, the Court should grant certiorari and reverse the judgment below on statutory rather than First Amendment grounds.

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the motion for leave to file that is printed with this brief.

STATEMENT

This case involves a suit by a disappointed candidate for office, over the content of a communication by one of her fellow members during the height of her election campaign. Respondent Shirley Smith-Bowman, a supervisor in a state welfare agency, ran for president of Service Employees Local 509, a union whose jurisdiction includes the entire state of Massachusetts and which represents private sector as well as public employees. During that campaign, petitioner David Heller, a non-supervisory employee who worked in the same office as respondent, created two collages of photographs that superimposed respondent's name and face, as shown on her campaign material, on sexist photographs taken from a Penthouse-style magazine. Petitioner's stated purpose was to poke fun at respondent's campaign and reflect what he regarded as "the absurdity of some of her views and statements." The trial court found that his material "amounted to an attempt to interfere with [respondent's] right to run for union office." Pet. App. A90.

During the campaign, respondent attempted to ignore the photographs in order to avoid making an issue of them; after she lost the election, she began to suffer "Post-Traumatic Stress Disorder." Thereafter, a union officer filed intra-union charges against petitioner, on respondent's behalf, and petitioner was censured for his collages. Respondent also filed suit against petitioner Heller and others in state court, alleging a variety of state torts, including defamation and intentional infliction of emotional distress, and a state civil rights claim. The infliction of emotional distress and civil rights claims were tried to the bench, resulting in an award of damages against petitioner.

On appeal, the Supreme Judicial Court of Massachusetts found no violation of the Massachusetts Civil Rights Act, but nevertheless affirmed the judgment because it was supported by the claim of tortious infliction of emotional distress. In accord with this Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), that a plaintiff cannot avoid meeting *New York Times* standards for a libel action simply by labeling a claim based on injurious expression as a different kind of tort, the Supreme Judicial Court turned directly to the question whether respondent was a public figure, generally or for the limited purpose of statements during her election campaign. It found that she was not, and therefore concluded that it was unnecessary to decide whether the respondent had shown actual malice on the part of petitioner. Pet. App. A12-A21. The Court also rejected petitioner's assertion that the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") provided him with special protection against the application of state tort law. According to the Court, federal labor law preempts a state tort claim **only** when the state claim is inextricably

intertwined with consideration of the terms of a collective bargaining agreement. *Id.* A24-A25, *citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

In dissent, two Justices rejected the majority's analysis of all federal law issues. First, they concluded that a candidate for union office, like a candidate for public office or a union incumbent, is a public figure at least for the purpose of statements related to that candidacy, therefore all candidates for union office must show actual malice. Second, they stated that the actual malice standard would apply even if respondent were a private figure, because this Court's cases require use of that standard in free speech cases involving unions. In this regard, they found in the LMRDA the relevant federal law that supported the policy of free speech in union office elections.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES IMPORTANT QUESTIONS OF FEDERAL LAW, BUT THE JUDGMENT CAN BE VACATED WITHOUT REACHING THE CONSTITUTIONAL QUESTIONS BECAUSE THERE ARE FEDERAL STATUTES THAT ARE DIRECTLY APPLICABLE TO THIS CASE.

We fully agree with petitioner's argument that a union member should be able to express his views about a candidate in a union election, however repulsive his expression may be, free of tort liability, unless the candidate can at least establish that the member's statements were false and were made with actual malice. In particular, we agree that a candidate for union office, like a union incumbent, is

a public figure for the purpose of comments directed to his performance in office or his campaign for election. Almost every lower court to consider that question has come to the same conclusion.[1]

We do not, however, agree with petitioner that it is necessary to reach the constitutional questions that are presented in his petition in order to arrive at that result. Quite to the contrary, the courts below were presented with, and resolved, issues of federal labor law preemption that, properly decided, would have required respondent to prove actual malice and more before her suit could succeed. Moreover, the decision below conflicts with the decisions of numerous federal and state courts that have applied such a preemption analysis to cases arising out of intra-union controversies comparable to this one. Accordingly, the Association urges the Court to grant the petition for a writ of

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[1] *Miller v. Transamerican Press*, 621 F.2d 721, 724 (5th Cir. 1980) (Teamsters union officer); *Carey v. Hume*, 492 F.2d 631, 634 n.3 (D.C. Cir. 1974) (general counsel of Mine Workers); *Teachers Local 1581 v. Ysrael*, 492 F.2d 438, 439 (9th Cir. 1974) (parties agreed that union and its officers were public figures); *Henry v. Air Traffic Specialists*, 836 F. Supp. 1204, 1206 n.3 (D. Md. 1993), *aff'd mem.*, 34 F.3d 1006 (4th Cir. 1994) (head of 1700-member union); *Bussie v. Larson*, 501 F. Supp. 1107 (M.D. La. 1980) (head of Louisiana AFL-CIO); *Einhorn v. LaChance*, 823 S.W.2d 405 (Tex. App. - Houston [1st Dist.] 1992) (organizers of group of pilots); *Savitsky v. Shenandoah Valley Pub. Corp.*, 389 Pa. Super. 176, 566 A.2d 901 (1989) (member, district executive board); *Lins v. Evening News Ass'n*, 342 N.W.2d 573, 579-580 (Mich. App. 1983) (head of Teamster local); *Korbar v. Hite*, 43 Ill. App.3d 636, 357 N.E.2d 135, 139 (1976) (head of Steelworkers local credit union). *See also NAGE v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996, 1002 n.12 (1979) (union is limited purpose public figure).

certiorari, but to resolve the case on the basis of federal labor law and thus avoid the constitutional issues that are presented in the petition.

1. To describe intra-union political debates as consisting of "robust" speech would be an understatement. As in American elections, accusations, hyperbole, name-calling and other strong language are common. It is not uncommon for rival candidates and factions to accuse each other of selling out to the employer, of being in bed with enemies of the union, of corruption of various kinds, of having dangerous or unconventional political views, and the like. For example, in the leading case of *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963), which established the basic judicial attitude toward members' free speech rights under the LMRDA, a union officer had written a leaflet calling a fellow officer a "petty robber," and describing others as "thieves, scabs, robbers, scabby bosses, bums, pimps, f------ bums, and jailbirds." *Id.* at 447. In the 1991 Teamster election, held under government supervision pursuant to a consent decree, the incumbents depicted the insurgent candidate as a scab; the reform candidate portrayed the incumbents as pigs feasting at a trough of money, and printed a photo of the principal incumbent candidate linking arms with one man wearing a prison uniform and another wearing a suit with a black shirt and white tie, carrying a machine gun.

The speech on both sides of the election in this case was apparently not atypical. Respondent accused both petitioner, and the candidate that petitioner supported, of being "communists." Petitioner, in turn, produced disgusting attacks on respondent which, although they had nothing to do with her qualifications for office, surely had

the effect of denigrating her candidacy. As we now explain, the courts have long protected the rights of union members to engage in vituperative exchanges in the course of an election campaign.

2. When the LMRDA was passed, a number of unions had provisions in their constitutions or bylaws that barred members from speaking ill of their officers; such provisions forbade members to make "false statements," to "spread dissension," to "abuse" or "slander" officers, and the like. The LMRDA, which among other things guarantees all members the right to "express any views, arguments and opinions," section 101(a)(2), did not, by its passage alone, deter union officers from trying to discipline members for violations of provisions of this sort. But the courts of appeals (and other courts) have been unanimous, since *Salzhandler v. Caputo*, *supra*, was decided in 1963, that section 101(a)(2) of the LMRDA forbids unions and their officers from disciplining members for the violation of such provisions. *Petramale v. Laborers Local 17*, 736 F.2d 13, 17 (2d Cir. 1985); *Rollison v. Hotel Restaurant Local 879*, 677 F.2d 741, 745-746 (9th Cir. 1982); *Keeffe Bros. v. Teamsters Local 592*, 562 F.2d 298, 304 (4th Cir. 1977); *Semancik v. UMW*, 466 F.2d 144 (3d Cir. 1972); *Machinists Fulton Lodge v. Nix*, 415 F.2d 212, 217-218 (5th Cir. 1969). Even where unions purported to do no more than forbid members to libel officers or to make malicious accusations, the courts have consistently held that members' free speech

rights trump the union's disciplinary authority. *E.g.*, *Semancik v. UMW*, 466 F.2d 144, 153 (3d Cir. 1972).[2]

3. As it became clear that union officials could not use union disciplinary tribunals to punish members who dared to speak out against them, and as the courts fashioned effective remedies for violations of the LMRDA, union officials have searched for counter-measures against dissenting members, in order to intimidate them from the exercise of their legal and political rights within the union. One very important weapon on which many union leaders have seized is the tort action — largely for libel or defamation, but using other theories as well — that seek actual and punitive damages from members who have criticized their conduct in office.[3]

Leaders will often file these cases, on a contingent fee basis, using the same lawyers whom they have hired to represent the union. In pursuing such cases, the union leader plaintiffs will often argue that they are entitled to discovery to identify all who might be responsible for the allegedly injurious statements, and thus to identify all persons who

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[2] Because union in this case represents both public and private sector employees, it is a "mixed" union that is covered by the LMRDA. 29 C.F.R. § 452.12 (1994); *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994); *Martinez v. AFGE*, 980 F.2d 1039, 1042 (5th Cir. 1993); *Hawaii Gov't Employees v. Martoche*, 915 F.2d 718, 720 (D.C. Cir. 1990).

[3] In that regard, this case is atypical because it was filed by a candidate for union office who complained about statements by a supporter of an incumbent who was seeking re-election. However, the decision below is not limited, and could not easily be limited, to the atypical facts presented.

have associated with the defendants for the purpose of union reform. Incumbents also seek to examine their challengers about the substance of their communications with fellow members, purportedly in order to investigate the truth or falsity of the statements or the failure to be careful about such truth or falsity. Not surprisingly, the discovery will both identify the communicators and reveal their plans and strategies for intra-union reform activity.

Such suits rarely produce a judgment for the plaintiff (not to speak of a collectible judgment, given the assets that rank-and-file union members normally have), but they force a dissident to spend his time, money, and energy on a lawsuit rather than on possible further challenges to the union incumbents. When such cases are brought, the individual union-member defendants must hire their own counsel to defend themselves (which normally cannot be done on a contingent basis). And, unlike LMRDA suits, in which the member may obtain fees pursuant to *Hall v. Cole*, 412 U.S. 1 (1973), courts have not been generally awarded attorney fees to successful union-member-libel-defendants. Consequently, the mere filing of such a tort action will often silence both the individual defendants and any other union members who might otherwise have been tempted to join the dissenters. The Association, which is frequently asked for help by union members facing intimidation from their unions, has found that the bringing of libel actions, or even the mere threat of suit, is having a significant effect in quashing the sort of intra-union activities that Congress intended to foster by passing the LMRDA, and that the courts have routinely found protected in actions contesting union discipline or other infringements of their rights.

4. Most courts recognize that libel or slander actions have the potential to trench on important interests protected by federal labor law, and thus have protected members against such suits by erecting high evidentiary standards that must be met before a suit may succeed. In this regard, they have drawn on several decisions of this Court recognizing a form of federal statutory protection for statements made by unions in the context of union organizing drives or strikes. *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966); *Letter Carriers Local 496 v. Austin*, 418 U.S. 264 (1974). In those contexts, the federal labor policy recognizes the need for robust and uninhibited expression, and thus requires that, before speakers may be held liable for defamation, the plaintiff must both meet the standards of *New York Times v. Sullivan*, 376 U.S. 254 (1964), by proving that statements were made with actual malice, and prove actual rather than presumed damages. Most state and federal courts have held that statements made in the course of intra-union political debates, whether in union elections or other intra-union controversies, fall squarely within the holdings of *Plant Guards* and *Letter Carriers*.[4]

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[4] *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1254 (2d Cir. 1970) (dictum); *NLRB v. Tanner Motor Livery*, 419 F.2d 216, 221 and n.6 (9th Cir. 1969) (dictum); *Jean v. Dugan*, 814 F. Supp. 1401, 1410 (N.D. Ind. 1993); *Henry v. Air Traffic Specialists*, 836 F. Supp. 1204, 1211 (D. Md. 1993), *aff'd mem.*, 34 F.3d 1006 (4th Cir. 1994); *Rodonich v. Laborers Local 95*, 115 LRRM 2482, 2490 (S.D.N.Y. 1983); *Brett v. Sohio Constr. Co.*, 518 F. Supp. 698, 706 (D. Alaska 1981); *Dazzo v. UAW Local 259*, 448 F. Supp. 799, 802 (E.D.N.Y. 1978); *Batson v. Shiflett*, 602 A.2d 1191, 1208 (Md. 1992); *Sheeran v. Colpo*, 460 A.2d 522, 524 (Del. Super. 1983); *Warren v. Herndon*, 115 Cal. App. 3d 141, (continued...)

Petitioner argued below that his collages were protected by federal labor law, which therefore limited the extent to which state tort law could make him liable to respondent. The Supreme Judicial Court completely misapprehended this argument (although the two dissenters understood it), referring instead to a completely different doctrine, not at all presented here, about the preemptive force of section 301 of the Labor-Management Relations Act when a state law claim substantially depends on an interpretation of a collective bargaining agreement. *See Lingle v. Norge*, 486 U.S. 399, 408-409 and n.8 (1988) (distinguishing section 301 preemption from NLRA preemption). As we have shown, however, federal labor law requires a showing of actual malice before petitioner may be held liable for publishing his collages. Although this federal privilege creates no basis for removal to federal court, it gives petitioner a defense that the state courts were required to recognize, but here did not.

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[4](...continued)
147, 171 Cal. Rptr. 220, 223 (1981); *Ross v. Duke*, 116 Ariz. 298, 300, 569 P.2d 240, 242 (App. 1977); *Beruan v. French*, 56 Cal. App. 3d 825, 828-829, 128 Cal. Rptr. 869, 871 (1976); *McIntyre v. Bakers for Democratic Union*, 54 A.D.2d 872, 388 N.Y.S.2d 587, 588 (1976); *Henderson v. Teamsters Local 313*, 90 Wash.2d 666, 585 P.2d 147, 150-151 (1978); *Lang v. Poffenbarger*, 31 Ohio App.2d 239, 287 N.E.2d 827, 828 (1972); *McKinnon v. Smith*, 52 Misc.2d 349, 275 N.Y.S.2d 900, 903-904 (Sup. Ct.), *aff'd*, 300 N.Y.S.2d 520 (1969). *See also Sheet Metal Workers v. Carter*, 133 Ga. App. 872, 212 S.E.2d 645, 647 (1975) (unspecified tort of injury to reputation). The Fifth Circuit, although citing *Linn* in dictum about intra-union speech, did not expressly state that its standards would apply to a state action for libel. *Machinists Fulton Lodge v. Nix*, 415 F.2d 212, 219 n.17 (1969).

5. Application of these doctrines in this case would require that the judgment below be vacated and remanded for further consideration under standards at least as strict as the standards for which petitioner contends based on his First Amendment arguments. In that regard, we note that, on the present record, it is quite possible that petitioner acted with "malice," if not with "actual malice," as applied to this type of conduct. Moreover, it is not at all clear that the expression here is defensible when considered under a proper standard. It is, however, plain that neither the trial judge nor the Supreme Judicial Court applied the applicable standards under federal labor law.

In summary, the Association agrees that the questions presented in the petition involve important issues of federal law, and it believes that the Court should grant certiorari to decide whether a plaintiff who, like respondent, seeks to hold a union member liable in tort for injurious statements must meet the applicable federal labor law standards. It further believes that the Court can decide that question in the petitioner's favor and thereby avoid reaching the constitutional questions. Accordingly, the Association urges the Court to grant certiorari, and to consider whether the judgment below should be vacated on federal statutory rather than constitutional grounds.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should direct the parties to address the statutory question as well as the constitutional one.

Respectfully submitted,

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